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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1014

GEORGIA L. LUSK
&
MYRON WIENER,
Petitioners,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ISIDORE H. WACHTEL
Counsel for Petitioners
1100 - 17th Street, N. W.
Washington, D. C.

RALPH J. ROHNER
JEAN J. PROVOST, JR.
Of Counsel

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Claims entered October 15, 1965 in the cause entitled *Georgia L. Lusk and Myron Wiener v. The United States*, Ct.Cl. No. 518-59.

OPINION BELOW

The opinion of the United States Court of Claims (Appendix A) will be reported in ___ Ct.Cl. ___ (1965). The stipulation of facts entered by counsel for the parties and filed with the court below on March 18, 1964 which provided the basis for defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment, while not incorporated in the decision of the court below, is fully set forth herein as Appendix B.

JURISDICTION

The judgment and order of the United States Court of claims was entered on October 15, 1965. On application by petitioners, this Court, on January 12, 1966 entered its order extending petitioners' time in which to file a petition for a writ of certiorari to and including February 13, 1966.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1255 (1).

QUESTIONS PRESENTED

1 (a). Did Congress, in enacting the Reorganization Act of 1949, confer or intend to confer on the president the authority to affect, influence, or otherwise control the performance of quasi-legislative, quasi-judicial functions of "independent" agencies such as the War Claims Commission, which had been expressly created by Congress in 1948 to be free from all executive influence and control and whose commissioners were not subject to executive removal but enjoyed tenure for the full term of the Commis-

sion's statutory life,[1] by granting to the president the power — under the guise of executive reorganization — to abolish that agency prior to the statutory expiration of said Commission and to transfer the functions thereof to a newly created agency wherein the commissioners serve at the pleasure of the president?

1 (b). If Congress, in enacting the Reorganization Act of 1949, did intend — as the court below held — to confer on the president the aforesaid authority, was such act unconstitutional as an improper delegation of legislative power, to wit, the presidential power to repeal an act creating such independent agency contrary to, and in contravention of, the provisions of Article I, Sections 1 and 8 of the United States Constitution? (Note: Though this constitutional issue was properly raised, briefed, and argued and is intrinsically related to the statutory interpretation adopted by the court below, the question was not considered or decided since the court below deemed its assertion barred by laches.

2 (a). Can the Court of Claims bar a claim at law against the United States commenced within the congressionally prescribed statutory period, by applying the doctrine of laches (1) where there has been no prejudice to the Government's ability or capacity to defend the suit, all pertinent facts having been stipulated; (2) where there has been no accretion in the amount of any damages for which the Government may be liable by virtue of any "delay" in the commencement of the suit; and (3) where the sole prejudice to the United States found by the court below was the possibility of future litigation if petitioners' position be sustained?

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[1] See Wiener v. United States, 357 U.S. 349 (1958).

2 (b). Where the questions of law presented by a claim involve primarily the interpretation of statutory language, and there is no dispute as to the pertinent facts, could the court below apply the doctrine of laches to bar the claim?

2 (c). Where the interpretation of statutory language by the Court of Claims raises a question of the constitutionality of the statute as so interpreted, can the Court of Claims refuse to consider that constitutional question on the ground of laches?

STATUTES INVOLVED

The provisions of the Reorganization Act of 1949, 63 Stat. 203, 5 U.S.C. § 133z (1949) involved herein, are as follows:

> 133z – 4. *Effective date of reorganizations specified in plan*
>
> (a) Except as may be otherwise provided pursuant to subsection (c) of this section, the provisions of the reorganization plan shall take effect upon the expiration of the first period of sixty calendar days, of continuous session of the Congress, following the date on which the plan is transmitted to it; but only if, between the date of transmittal and the expiration of such sixty-day period there has not been passed by either of the two Houses, by the affirmative vote of a majority of the authorized membership of that House, a resolution stating in substance that that House does not favor the reorganization plan.
>
> (b) For the purposes of subsection (a) of this section –
>
> (1) continuity of session shall be considered as broken only by an adjournment of the Congress

sine die; but

(2) in the computation of the sixty-day period there shall be excluded the days on which either House is not in session because of an adjournment of more than three days to a day certain.

(c) Any provision of the plan may, under provisions contained in the plan, be made operative at a time later than the date on which the plan shall otherwise take effect. June 20, 1949, c. 226, Title I, § 6, 63 Stat. 205.

§ 133z–5. *Definition of "agency"*

When used in sections 133z-133z–15 of this title, the term "agency" means any executive department, commission, council, independent establishment, Government corporation, board, bureau, division, service, office, officer, authority, administration, or other establishment, in the executive branch of the Government, and means also any and all parts of the municipal government of the District of Columbia except the courts thereof. Such term does not include the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government. June 20, 1949, c. 226, Title I, § 7, 63 Stat. 205.

The pertinent portion of 28 U.S.C. § 401 involved is as follows:

§ 2501. *Time for filing suit*

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT

Petitioners herein, Lusk and Wiener, had been appointed by President Truman (with the advice and consent of the Senate) to serve as Commissioners of the War Claims Commission. They were serving in that capacity when, in 1953, President Eisenhower requested their resignations so that he might appoint in their places "personnel of my own selection." They both refused to resign and were unlawfully removed from office, *Wiener v. United States,* 357 U.S. 349 (1958). The President thereupon attempted, through recess appointment, to name successors to their posts. *Said recess appointees were never confirmed by the Senate prior to July 1, 1954.*

Petitioner Wiener immediately sought to contest the removal and the recess appointments by requesting the Attorney General to institute *appropriate* proceedings. The Attorney General having refused to do so, petitioner Wiener, on February 3, 1954, did institute *quo warranto* proceedings challenging the right of the nominees of the President to hold office as War Claims Commissioners, *The United States ex rel Myron Wiener v. Raymond T. Armbruster, Whitney Gilliland, and Pearl Carter Pace,* United States District Court for the District of Columbia, C.A. No. 447-54.

While said proceedings were pending in the United States Court of Appeals, the President, on April 29, 1954, transmitted to Congress, Reorganization Plan No. 1 of 1954 whereby he purported (1) to abolish the War Claims Commission; (2) to abolish the International Claims Settlement Commission; and (3) to transfer *all the functions* of both commissions to a newly created commission to be known as the Foreign Claims Settlement Commission.

Whereas the Commissioners of the War Claims Commission had enjoyed tenure for the statutory life of the War Claims Commission and had not been subject to executive removal, control, or other executive influence in the conduct of their duties, *Wiener v. United States, supra,* the tenure of the Commissioners of the newly "reorganized" Commission were expressly made subject to executive removal and served at the pleasure of the president.[2] The aforesaid Reorganization purported to be pursuant to the authority granted to the president under the Reorganization Act of 1949, 5 U.S.C. § 133z, *et seq.*

Subsequent to the effective date of Reorganization Plan No. 1 of 1954, to wit, July 1, 1954, the parties to the aforedescribed *quo warranto* proceeding pending in the United States Court of Appeals, agreed to a dismissal of the appeal on the grounds that the basic issue therein presented had been rendered moot by virtue of said reorganization. Thereupon, on the 20th day of August, 1954, petitioner Wiener instituted suit in the United States Court of Claims (Ct.Cl. No. 337-54) for the recovery of salary he was prevented from earning during the period December 11, 1954 through June 30, 1954. This Court, in *Wiener v. United States, supra,* held that petitioner Wiener's removal by the President was unlawful, and remanded the cause to the United States Court of Claims which, on August 27, 1958, *on the written stipulation of the parties,* entered judgment for plaintiff Wiener, 143 Ct.Cl. 956

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[2] Under the original International Claims Settlement Act, the president was empowered to abolish that agency and to set the terms of office of its commissioners, and the commissioners were subject to removal by the Secretary of State, International Claims Settlement Act of 1949, § 3(c), Pub. L. 455, 64 Stat. 12, 81st Cong., 2d Sess. (1950).

(1958). Subsequent to that date, petitioner Lusk submitted her claim for salary for the period December 10, 1953 through June 30, 1954, during which period she was unemployed, to the General Accounting Office, and in December, 1958 received payment of said claim.

On December 2, 1959, approximately one year after petitioner Lusk received payment from the General Accounting Office, *one year and three months* after entry of judgment in the aforesaid *Wiener* case, and five years and five months after the effective date of Reorganization Plan No. 1 of 1954, both petitioners Lusk and Wiener jointly filed the instant suit in the Court of Claims contesting the validity, propriety, and/or legality of Reorganization Plan No. 1 of 1954, and, alternatively, the constitutionality of the Reorganization Act of 1949.

Petitioners contended below that Reorganization Plan No. 1 of 1954 was contrary to, and violated the express provisions of the Reorganization Act of 1949, *supra,* since that act did not authorize or invest the executive with the right to affect, influence, control, or otherwise impinge upon the *legislative and judicial functions* of a quasi-legislative and quasi-judicial agency such as the War Claims Commission. Alternatively, petitioners contended that should the Reorganization Act of 1949 be construed as permitting and authorizing the executive to affect, influence, control, or otherwise impinge on the performance of legislative and/or judicial functions by such a quasi-legislative, quasi-judicial agency, such act was unconstitutional as an improper delegation to the executive of the functions reserved under the Constitution exclusively to the legislature.

The court below, by decision dated October 15, 1965, held that the Reorganization Act of 1949 did authorize and permit the executive to affect, influence, control, or otherwise impinge on the discharge of legislative and executive functions of the War Claims Commission, and *additionally held, that in any event, the claim was barred by laches.* The court below did not address itself to the constitutional question which arose from the statutory construction it adopted since "... plaintiffs are precluded, on the ground of laches, from attacking the constitutionality of the Reorganization Act. . . ." (Slip Opinion, page 7, Appendix A).

The court below purported to premise its holding of laches on (1) unreasonable delay, and (2) actual detriment or prejudice to defendant. The sole prejudice to defendant found and relied on by the court below was the ". . . possibility of 'litigation by private interests resisting the acts of a reorganized agency on the ground that it was illegally constituted,'" Accordingly, the court granted the Government's motion for summary judgment, denied petitioners' cross-motion for summary judgment, and dismissed the petition.

REASONS FOR GRANTING WRIT

1. The decision of the Court below construing the Reorganization Act of 1949 raises timely and cogent issues which merit the attention and concern of this Court. In President Johnson's State of the Union message in January of this year, the present need for broad-scale *executive* reorganization was emphasized. Since the Reorganization Act of 1949 constitutes the existing statutory means by which executive reorganizations may be accomplished, since the decision below represents the *first* judicial construction

of the scope and applicability of that act, and since the construction adopted below does raise serious constitutional questions affecting the separation of powers, as well as the very nature of the legislative power, a definitive review of that decision is in order.

In addition to those governmental agencies which perform purely "executive" functions, many agencies and commissions have been designated by Congress to perform special functions which are essentially legislative or judicial in nature — functions such as the regulation of trade, communications, and utilities (Federal Trade Commission, Federal Communications Commission, Federal Power Commission), labor-dispute adjudication (National Labor Relations Board), or claims and tax disputes (War Claims Commission, Tax Court). Such agencies, in many respects, necessarily exercise some form of limited executive power with respect to "housekeeping" activities, e.g., personnel, supplies, and other administrative details. Their primary *raison d'etre* is the performance of functions under applicable and specific congressional directives as "quasi-legislative" or "quasi-judicial" bodies. Yet as this Court has stated, none of these bodies can

> . . . in any proper sense be characterized as an arm or an eye of the executive . . . . To the extent that it exercises any executive function — as distinguished from executive power in the constitutional sense — it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial department of the government, *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1934).

In the past, many of such agencies and commissions have been reorganized under the authority of

the 1949 Act.[3] Never, however, have the legislative and judicial *powers and functions* of any independent agency other than the War Claims Commission been affected by a presidential reorganization under the Act insofar as petitioners have been able to ascertain. Yet the court below held that:

> . . . Congress did *not* wish the Reorganization Act of 1949 to impose any general limitation upon the reorganization of quasi-judicial and quasi-legislative functions (Slip Opinion, page 5, Appendix A).

That holding would clearly seem to encompass and support executive reorganizations of all those functions in *all* agencies, including those heretofore mentioned. The decision below has a patent effect on the doctrine of the separation of powers flowing from

> . . . the fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others. (*Humphrey's Executor v. United States, supra,* at 629.)

and makes it vital that this Court review the decision below insofar as it supports presidential action which results in the modification, alteration, or abolition of any quasi-legislative, quasi-judicial agency.

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[3] E.g., Federal Trade Commission — Reorganization Plan No. 8 of 1950; Federal Maritime Commission — Reorganization Plan No. 6 of 1949, Reorganization Plan No. 21 of 1950, Reorganization Plan No. 7 of 1961; Federal Power Commission — Reorganization Plan No. 9 of 1950; Civil Aeronautics Board — Reorganization Plan No. 13 of 1950; and Securities & Exchange Commission — Reorganization Plan No. 10 of 1950.

An even more fundamental issue, which goes to the heart of the legislative process under our constitutional form of government, is raised by the decision of the court below. Under the language of the Reorganization Act, a presidentially-submitted reorganization plan will automatically go into effect within sixty days if a majority of the "authorized membership" of either house of the legislature does not vote a disapproval. But can any presidential act be allowed to substantially affect, alter, modify, or abolish a specific and express statutory grant of authority to an independent agency, thus effectively amending or repealing an act of Congress through congressional inactivity? The court below held that ". . . by not exercising its power of disapproval, the Congress indicated its full acceptance of the plan," (Slip Opinion, page 6, Appendix A). That conclusion does not appear consonant with the implications of this Court's language in *Greene v. McElroy,* 360 U.S. 474, 507 (1959):

> . . . explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effort would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

In *Youngstown Sheet and Tube Company v. Sawyer,* 343 U.S. 579, 587 (1951), this Court pointed out that under our Constitution, the powers of the president were limited to ". . . the recommending of the laws he thinks wise and the vetoing of laws he thinks bad." But no court has ever addressed itself to the question of whether a recommendation of the president can, in

fact, be enacted into law through congressional inactivity or, as characterized by defendant below, by the "tacit approval" of Congress.[4] Though the act of legislating — in this country as well as in England — is traditionally one of affirmative action by the legislature, petitioners find no specific authority, in the decisions of this Court or elsewhere, that legislation through inaction, or tacit action, is improper. Yet, since any utilization of this technique necessarily results in a shifting of initiative from the legislature to some other source, this fundamental question deserves the consideration of this Court.

Moreover, the construction adopted by the court below would empower the president — under the guise of reorganization — to discharge officers outside the executive branch by abolishing an agency and transferring its functions to another agency. Such a result, of course, would be in direct derogation of this Court's decisions in *Humphrey's Executor v. United States, supra,* and *Wiener v. United States, supra.* Yet it would be impossible to attribute and to *prove*

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[4] But some members of Congress have expressed misgivings about the constitutional propriety of this procedure; cf., additional views of the Honorable Clare E. Hoffman of Michigan, H. Rep. No. 367, 86th Cong., 1st Sess. (1959):

> The act reverses the constitutional legislative process, under which the Congress, subject to a conditional veto, enacts legislation. Under the Reorganization Act, the President, subject to a veto by the Congress, writes legislation.

a meritricious presidential motive underlying any such reorganization. Indeed, the replacement of certain officers, perhaps of a different political persuasion, with personnel of his own choosing might well appear to a president to be the single, most important step to take to promote "efficiency" in a given agency. Consequently, though the decision below does not directly conflict with the cited decisions of this Court, it does hold that, although the Commissioners may have been personally free from *direct* "control or coercive influence," the agency itself is *not* a

> . . . body that was 'entirely free from the control or coercive influence direct or indirect,' *Humphrey's Executor v. United States*, supra, 295 U.S. 629, of either the executive or Congress. . . . (*Wiener v. United States, supra,* at 355.)

The apparent and potential conflict arising from the possibility of permitting through indirection that which clearly cannot be accomplished directly offers a proper subject meriting review by this Court at this time.

2. The decision of the Court of Claims rests, in substantial part, on the doctrine of *laches* — the traditionally equitable principle that a claimant may be barred from presenting and prosecuting an otherwise meritorious claim if his delay in initiating the action is unreasonable and will result in substantial and irreparable prejudice to the defendant. The court below utilized the doctrine of laches as an alternative ground for disposition of the statutory interpretation question. More importantly, however, the court avoided any discussion of the constitutional question squarely raised by their interpretation by stating:

> Since we hold that plaintiffs are precluded, on the ground of laches, from attacking the constitu-

tionality of the Reorganization Act, we decline to discuss the merits of their argument. (Slip Opinion, p. 7, Appendix A.)

We question both the power of the Court of Claims to invoke that doctrine and, even assuming that power in the abstract, the propriety of its application in the instant case. In this case, petitioners' claim was filed within the six-year period permitted by law, there was no resulting prejudice to the United States in the defense of this action (all pertinent facts having been stipulated), and there has been no accumulation of damages payable by the United States should petitioners ultimately prevail.[5] The only finding of prejudice by the Court of Claims was that a decision in favor of petitioners would amount to an "invitation" to future claims against the United States.

(a). Congress, in establishing the Court of Claims, purposely, expressly, and affirmatively relinquished the sovereign immunity of the United States from suit in certain defined classes of action, and granted to that court jurisdiction over such claims if timely filed. Because of this unique jurisdictional foundation, the six-year "statute of limitations" applicable in the Court of Claims has been recognized as a jurisdictional prerequisite [or condition precedent] to the exercise of the Court of Claims' adjudicatory function, which the court is bound to respect even if not put in issue by the litigants and even if affirmatively waived by those charged with the defense of the

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[5] Petitioners' claim, and their theory of entitlement, covers only the period from July 1, 1954, the "effective date" of Reorganization Plan No. 1 of 1954, and March 31, 1955, the date of the statutory expiration of the War Claims Commission.

United States, *Finn v. United States*, 123 U.S. 227 (1887), *Wallace v. United States*, 142 F.2d 240 (2d Cir., 1944), *cert. denied* 323 U.S. 712. If the six-year period is construed as a negation of jurisdiction beyond that point in time, *Kendall v. United States*, 107 U.S. 123 (1883), *Soriano v. United States*, 352 U.S. 270 (1957), does it not also operate as a positive affirmation of jurisdiction until the expiration of those six years? Can the court below deprive a claimant of the use of the forum created by Congress to adjudicate his claim when the express prescription of Congress governing assertion of the claim has been met?

Precisely, then, by applying laches it appears that the Court of Claims has, without the express or implied consent of Congress, effectively restored to the United States a portion of the "immunity" which Congress intended to, and did, expressly abrogate. The implications of this action loom even larger when it is recalled that the central issue whose adjudication was barred was the alleged unconstitutionality of a federal statute. We are aware of no cases where this Court on the grounds of laches has refused to consider a properly-raised constitutional question raised in the assertion of a claim at law.

In light of the apparent intent of Congress to establish for the Court of Claims both a unique subject-matter jurisdiction asserted within a specific period of time, the attempt by that court to qualify its own jurisdiction by application of a sweeping laches defense raises important federal questions concerning the nature and jurisdiction of the Court of Claims.

(b). The impact and ramifications of the Court of Claims' holding in the instant case — that constitutionally based claims may be swept under the rug if

a claimant's delay has raised the possibility of additional suits against the Government — could conceivably stifle the Court of Claims' role as a "special" open forum for litigation involving the United States. The court below did not find that the United States suffered any prejudice in the direct defense of this action. Rather, the court's holding was that fatal prejudice arose from the possibility that, if the reorganization of the War Claims Commission were held invalid, such holding would constitute an "invitation" to others to challenge the acts of the succeeding Foreign Claims Settlement Commission.

We do not concede that the invalidity of the attempted abolition of the War Claims Commission would necessarily imply that all official acts of the new agency are null and void (indeed, this point was briefed and argued below). But, even if such contingency were likely, the Court of Claims is *required by law* to adjudicate such claims against the United States. The anomaly becomes sharper stated thusly: the court in the present case has looked into the future and found that if it holds for petitioner in its present claim against the Government, that holding might inspire other unidentified persons to initiate claims against the Government. This naked possibility, the court held, defeats petitioners' right to prosecute the present action. In the fullest sense, the purposes and functions of the Court of Claims are at issue, and require determination by this Court.

(c). Yet a further repercussion of the use of "laches" as a bar to a constitutional claim, is suggested by this Court's landmark holding in *Massachusetts v. Mellon,* 262 U.S. 447, 488 (1923). In practical terms, the holding in that case indicates that the right to challenge the constitutionality of

federal statutes is vested in a precious few individuals having proper "standing to sue." In a sense, therefore, any individual (such as petitioners herein) who can and does challenge federal legislation, acts as spokesman for the entire nation. If, indeed, the Reorganization Act of 1949 is unconstitutional, and if petitioners may nonetheless be barred by laches, the invalidity of that act and the resulting Presidential action may never be litigated for lack of a claimant with proper standing. The implications of petitioners' challenge are, therefore, broader than their own financial interests, and should be weighed against the mechanical application of a seeming technicality such as laches to the actual prejudice of countless citizens who, though interested, lack standing to sue.

Moreover, the precedent established by the use of laches to bar a challenge of constitutionality is necessarily one of far-reaching consequence. Frequently persons having "standing" to challenge the constitutionality of legislation are unaware of the possibility of a favorable determination because of the existing social, political, or economic climate. Or perhaps, for practical reasons, they may choose to await resolution of pending actions. Still others may be unable to afford to institute suit promptly. Yet the passage of time and the continued "growth" of the law, notably through the pronouncements of this Court, may mature the acceptability of certain constitutional concepts. (At hand are the recent metamorphoses in the fields of legislative apportionment, criminal procedure, right to privacy, civil liberties, censorship, and voting requirements.) Would this Court, or any court, suggest that a citizen is precluded from challenging a poll-tax requirement if he has dutifully paid that tax for many years? Is a motion-picture distributor barred from challenging the validity of cen-

sorship procedures because he has submitted his pictures for review in the past? Could Oliver Brown have been prevented from contesting the constitutionality of school segregation on the grounds that by his delay he had "invited" countless additional suits against the school board?

(d). This Court exercises supervision over the Court of Claims insofar as that court formulates and enunciates principles of federal common law. In this case, the Court of Claims has, in effect, invoked and applied the equitable principle of laches to bar petitioners where the Government suffered no prejudice in the defense of the suit, where the sole relief sought by petitioners was *legal* relief (i.e., an award of back salary), where there has been no augmentation of the damages the United States may have to pay, and where the only "prejudice" found by the court below is the "possibility" that, if petitioners prevail in this action, the United States will be required to defend additional suits challenging the validity of acts of the Foreign Claims Settlement Commission. We have found no authority which sustains the propriety of "laches" on such type of "prejudice." Thus it appears the Court of Claims has developed a new rule of federal common law that any litigant who may suffer the usual "prejudice" incident to the loss of a lawsuit will now be able to successfully assert such prejudice to support a plea of laches. We challenge the soundness of such a rule. Since federal common law may also be applied in the federal district and circuit courts, we submit that the importance of this challenge surpasses the boundaries of the Court of Claims alone.

CONCLUSION

For all the foregoing reasons, the issues herein presented do involve serious, substantial and important federal questions of law which should be decided by this Court.

Respectfully submitted,

ISIDORE H. WACHTEL
Attorney for Petitioners
1100 - 17th Street, N. W.
Washington, D. C.

RALPH J. ROHNER
JEAN J. PROVOST, JR.
Of Counsel